Supreme Court, U.S.
FILED
DEC 14 1993
OFFICE OF THE CLERK

93-955
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOHN S. BEESON, ET AL., Petitioners

v

PHILLIPS, KING AND SMITH, ET AL, Respondents

AND

RESOLUTION TRUST CORPORATION, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John S. Beeson
Counsel of Record for Petitioners
5925 Kirby Drive
Houston, Texas 77005
(713) 942-9912

Miller B. Walker, Jr.
Counsel for Petitioners
Houston, Texas

QUESTIONS PRESENTED FOR REVIEW:

1. Whether Petitioner John S. Beeson suffered a "legal injury" on September 30, 1986, when he obtained a loan to buy the shares of stock of some of the other investors in Lincoln Savings & Loan of Miami, Florida, so as to begin the running of the Texas two year Statute of Limitations against him on his malpractice claims against the Respondents Phillips, King and Smith, et al (i.e., Law Firm).

2. Whether the claims of Petitioners John S. Beeson and Lynn Foster against First South Savings Association (First South) as set out in a suit filed in the State District Court of Harris County, Texas prior to the Federal Savings and Loan Insurance Corporation being appointed conservator of First South were records of First South so as to permit Petitioners to assert their defenses of fraudulent inducement against the Respondent Resolution Trust

Corporation on promissory notes executed by Petitioners and payable to First South if such notes were non-negotiable.

PARTIES

PETITIONERS

John S. Beeson

Lynn Foster

RESPONDENTS

Phillips, King & Smith

Phillips, King, Smith & Levi

Phillips, King, Smith & Wright, Inc.

Phillips, King, Smith & Wright, P.C.

Smith, Wright & Weed, P.C.

Charles E. Harrell

Anthony W. Nims

Harold L. Levi

E. Ashley Smith and E. Ashley Smith, P.C.

C. Lee Crawley

C. L. Crawley, Jr., P.C.

William E. King

G. Christopher Scruggs

Robert L. Johnson, III

Thomas H. Weed

W. David Blunk, Jr. (David W. Blunk, Jr.)

First South Savings Association - In Receivership

Resolution Trust Corporation ("RTC")

OTHER PARTIES IN THE COURT OF APPEALS WHO HAVE NO INTEREST IN THE OUTCOME OF THIS PETITION

Robert L. Randolph

Bob M. Johnson

Mickey D. Altman

Dennis R. Ranzau

TABLE OF CONTENTS

TABLE OF CONTENTS..... v.

TABLE OF AUTHORITIES..... vii.

OPINIONS BELOW..... 1

STATEMENT OF JURISDICTION..... 1

STATUTORY PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE..... 2

REASONS FOR GRANTING THE WRIT..... 13

I. Certiorari should be granted because the Court of Appeals by affirming the Summary Judgment in favor of the Law Firm against Beeson sanctioned the action of the District Court action in granting such Summary Judgment by holding in favor of the Law Firm on an issue on which it bears the burden of proof and on which there was absolutely no evidence..... 13

II. Certiorari should be granted because the Court of Appeals declined to decide the question of negotiability of Petitioners' Promissory Notes because the Petitioners' State court lawsuit was not a "record of the bank" when the FDIC took over First South based upon *Langley v. FDIC*, 484 U.S. 86 (1987). *Langley* did not decide this and it is an important question of Federal law which should be decided by this Court..... 22

1. The Petitioners' Promissory Notes to First South are non-negotiable and thus the RTC is not a holder in due course..... 22

2. Because Petitioners' Promissory Notes are non-negotiable the personal defenses asserted by them are available against the RTC..... 35

CONCLUSION..... 41

TABLE OF AUTHORITIES

CASES:

Ackerman v. Federal Deposit Insurance Corp.,
930 F.2d 3 (5th Cir. 1991)..... 25, 26

Amberboy v. Societe de Banque Privee et al,
831 S.W.2d 793 (Tex. 1992)..... 25, 26, 28, 29, 30, 31, 32, 33, 34

Atkins v. Crosland,
417 S.W.2d 150 (Tex. 1967)..... 16, 17, 18

Celotex Corp. v. Catrett,
477 U.S. 317 (1986)..... 17

D'Oench, Duhme & Co. v. FDIC,
315 U.S. 447, (1942)..... 38, 40

Howell Hydrocarbons, Inc. v. Adams,
879 F.2d 183, 191 (5th Cir. 1990)..... 17

Kilpatrick v. Riddle,
907 F2d 1523 (5th Cir. 1990)..... 40

Langley v. FDIC,
484 U.S. 86 (1987)..... v., 22, 39, 40

Metal Structures Corp. v. Plaines Textiles, Inc., 470 S.W.2d 93
(Tex.Civ.App.-Amarillo 1971, no writ)..... 17

Randolph, et al v. Resolution Trust Corp., et al, 1, 12, 14
995 F.2d 611 (5th Cir. 1993)..... 15, 16, 18

Resolution Trust Corporation v. Montross,
944 F.2d 227 (5th Cir. 1991)..... 36, 38

Sunbelt Savings, FSB Dallas, Texas v. Montross,
923 F.2d 353 (5th Cir. 1991, reh'g granted)..... 35, 36

Texas Refrigeration Supply v. FDIC,
953 F.2d 975 (5th Cir. 1992,
reh'r den April 2, 1992)..... 38

Woods v. William M. Mercer, Inc.,
769 S.W.2d 515, 517 (Tex. 1988)..... 17

Statutes And Rules:

28 U.S.C. § 1331..... 2

12 U.S.C. § 1823(e)..... 39

28 U.S.C. § 1254(1)..... 1

FRCP, Rule 56..... 16

FRCP, Rule 8 (c)..... 17

Tex.R.C.Proc. Rule 94..... 17

Texas Civil Practice And Remedies Code
§ 16.003 (a)..... 1

OPINIONS BELOW

The July 19, 1993 Opinion of the Court of Appeals for the Fifth Circuit, whose Judgment is herein sought to be reviewed, is reported at 995 F.2d 611 and is reprinted in the Appendix to this Petition at "A". The prior Opinion of the United District Court for the Southern District of Texas dated April 27, 1992, is reprinted in the Appendix at "B".

STATEMENT OF JURISDICTION

The Judgement of the Court of Appeals was entered July 19, 1992. On September 15, 1992, the Court of Appeals denied a Petition for Rehearing. This Denial of Rehearing is reprinted in the Appendix at "C". The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 16.003 (a) of the Texas Civil Practice And Remedies Code which provides as

follows:

> "A person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues."

This is the Texas statute of limitations governing the time within which a cause of action for legal malpractice can be brought.

STATEMENT OF THE CASE

The United States District Court for the Southern District of Texas had jurisdiction over this case under 28 U.S.C. § 1331.

Petitioner John S. Beeson will be referred to herein

as "Beeson".

Petitioner Lynn Foster will be referred to herein as "Foster".

Petitioner Lynn Foster, and the non-petitioning Robert L. Randolph, Bob M. Johnson, M. D. Altman and Dennis Ranzau will be referred to herein, as they were in the Opinion of the United States Court of Appeals for the Fifth Circuit, inclusively and collectively as the "Five Investors".

The term "Law Firm" as used herein inconclusively and collectively refers to Phillips, King & Smith, Attorneys at Law; Phillips, King, Smith and Levi, Attorneys at Law; Phillips, King, Smith and Wright, Inc., Attorneys at Law; Phillips, King, Smith and Wright, P.C., Attorneys at Law; Smith, Wright and Weed, P.C., Attorneys at Law; Charles E. Harrell; Anthony W. Nims; Harold E. Levi; C. Lee Crawley; C. L. Crawley, Jr., P.C.; William E. King; G. Christopher Scruggs; E. Ashley Smith; E. Ashley Smith,

P.C.; Robert L. Johnson, III; Thomas H. Weed; and David W. Blunk, Jr.

Lincoln Savings & Loan Associates will be referred to herein as "Lincoln".

First South Savings Association will be referred to herein as "First South".

The Federal Savings and Loan Insurance Corporation will be referred to herein as "FSLIC".

The Federal Deposit Insurance Corporation will be referred to herein as "FDIC".

The Resolution Trust Corporation will be referred to herein as "RTC".

Lincoln was a Federally insured savings association located in Miami, Florida. First South was a Federally insured savings association located in Port Neches, Texas with a branch office located in Houston, Texas. From at least 1985 and extending through June of 1987, various law firms with a number of common partners, including Phillips

served as First South's primary legal counsel. Phillips also served as Chairman of the Board of First South from 1982 until July of 1987 during which period of time he was a Director and a managing Officer of First South. From at least 1985 until his resignation from the Board in 1987, Phillips was also the majority stockholder in First South.

In early 1984, Beeson entered into an agreement with two other individuals to purchase controlling shares of Lincoln. The Law Firm represented this original group of investors. The other two individuals withdrew and another group of approximately 13 investors, including Beeson and the Five Investors, began to proceed with the acquisition of Lincoln stock. This was still in 1984. The Law Firm agreed to continue to represent Beeson and the other investors in the acquisition of Lincoln.

On January 5, 1985, First South made loans to Beeson, Foster, Johnson and Randolph and some of the other investors for the purchase of Lincoln stock. These

loans were secured primarily by shares of common stock in Lincoln. Altman and Ranzau did not purchase their Lincoln stock until December, 1986, but did purchase it with loans from First South secured by shares of Lincoln stock.

On January 7, 1985, Beeson, three of the five investors (excluding Altman and Ranzau who did not purchase their stock in Lincoln until December, 1985) and the other investors purchased a controlling share of Lincoln stock. The Law Firm represented Beeson, three of the Five Investors and the other investors during this acquisition.

In August of 1985, the Federal Home Loan Bank Board began an investigation of Lincoln, and the examiner asserted that Beeson and several of the other investors in Lincoln had acted in concert to purchase Lincoln stock. Beeson consulted the Law Firm about the acting in concert problem and it was decided that he should attempt to buy the stock of some of the other investors to resolve the acting in concert issue. On September 30, 1986, as part of

the stock buy-out plan Beeson obtained an extension and renewal of his original loan from First South in the amount of $2,576,000.00 and First South granted Beeson a new loan of $689,295.50 to purchase the stock of some of the other investors. These loans were secured by 237,210 shares of Lincoln stock and by Beeson's interest in certain real properties.

In 1987, the Federal Home Loan Bank Board, apparently not satisfied with Beeson's buy out of the stock of certain other investors, required Beeson and the Five Investors to withdraw from any participation in the operations of Lincoln.

On January 31, 1989, First South filed suits against the Five Investors in various State District Courts of Harris County, Texas, seeking recovery on the Promissory Notes executed by them and payable to First South. On February 8, 1989, the Five Investors, as well as Beeson, as co-Plaintiffs, filed a separate suit in the State District Court of

Harris County, Texas, seeking cancellation of each of their Promissory Notes as well as damages against First South. In this same action Beeson and the Five Investors sued the Law Firm for negligence and fraud. First South was served with Plaintiff's suit on February 21, 1989.

On March 16, 1989, the Federal Home Loan Bank Board appointed the FSLIC as Conservator of First South. The FSLIC removed all six law suits from the Harris County District Courts to the United States District Court for the Southern District Court of Texas which consolidated them on August 10, 1989. The five law suits filed by First South were consolidated into the suit originally filed by Beeson and the Five Investors where it was docketed as C.A. H-89-1302.

In their Second Amended Complaint, Beeson, et al (Beeson and the Five Investors) asserted that various acts on the part of First South and the Law Firm constituted erroneous advice, negligence, bad faith and fraud in their

dealings with the Petitioners in connection with Petitioners purchase of Lincoln stock and that First South and the Law Firm were acting in concert. Petitioners further contended that as a result of the negligent actions, bad faith and intentionally fraudulent conduct in regard to handling the change of control of Lincoln, the Petitioners, as well as other purchasers of Lincoln stock, were required by the Bank Board to remove themselves from control and operation of Lincoln. This in turn prevented Petitioners, and the other investors, from infusing additional capital into Lincoln and from using their expertise and knowledge in real estate, real estate lending and real estate development to further the business interests and financial success of Lincoln. Petitioners asserted that as a result of their being forced by the Bank Board to relinquish control of Lincoln and to no longer participate in its operations Lincoln failed and was taken over by the FSLIC in 1989.

By their Second Amended Complaint, Petitioners

sought cancellation of their Promissory Notes made payable to Lincoln or, alternatively, judgment against all the Defendants in an amount equal to the original principal amount of each of Petitioners' Promissory Notes together with all accrued interest and penalties. Petitioners further sought judgment against First South and the Law Firm Defendants for loss of profit each would have made on his investment in Lincoln. Petitioners also sought judgment against First South and the Law Firm Defendants for prejudgment interest, postjudgment interest, costs and attorneys' fees.

On August 9, 1989, the provisions for the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) became effective, and the RTC succeeded to the rights and powers of the FSLIC and became Receiver for First South.

In September, 1991, the Law Firm filed Motions For Summary Judgment against the Plaintiffs and against the

RTC.

By Final Judgment signed April 27, 1992, Judge Norman W. Black of the United States District Court For the Southern District of Texas, Houston Division:

1. Dismissed the Petitioners claims against the Law Firm;
2. Dismissed the claims of the RTC against the Law Firm;
3. Granted the RTC Judgment against the Petitioners on their respective Promissory Notes together with accrued interest and post judgment interest;
4. Awarded the RTC attorneys' fees against the Petitioners;
5. Awarded the RTC attorneys' fees against the Petitioners if the appeal of the Final Judgment did not prevail;
6. Dismissed With Prejudice the Petitioners claims against the RTC and First South.

Also on April 27, 1992, Judge Black signed an Order setting out his reasons for Granting a Final Judgment *as he did. (Appendix* "B")

Beeson, the Five Investors, and the RTC appealed the District Court Judgment to the United States Court of Appeals for the Fifth Circuit (Court of Appeals). In a decision dated July 19, 1993, (Appendix "A") the Court of Appeals affirmed the grant of the District Court's Judgment in favor of the RTC on the Promissory Notes of Beeson and Foster (prior to the decision of the Court of Appeals, the RTC had sold the Randolph, Johnson, Altman and Ranzau Notes to a third party and a settlement was reached between this third party and those four appellants) and affirmed the grant of the Summary Judgment against Beeson on his malpractice claim on the basis that it was barred by limitations. The Court of Appeals vacated the Summary Judgment against Foster, Johnson, Randolph, Ranzau and Altman on their malpractice claims against the Law Firm

and remanded for further proceedings. Beeson petitions for Writ of Certiorari to the Court of Appeals because of it's holding that his malpractice claim against the Law Firm Defendants was barred by the statute of limitations. Beeson and Foster petition for a Writ of Certiorari to the Court of Appeals because of it's decision that their defenses against the RTC's claims on their Promissory Notes payable to First South were not supportable.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted because the Court of Appeals by affirming the Summary Judgment in favor of the Law Firm against Beeson sanctioned the action of the District Court in granting such Summary Judgment by holding in favor of the Law Firm on an issue on which it bears the burden of proof and on

which there was absolutely no evidence.

The Court of Appeals correctly held that "...Texas Law imposes two requirements for the accrual of a legal malpractice cause of action: (1) the commission of a tortious act and (2) the suffering of a legal injury." ***Randolph, et al v. Resolution Trust Corp.***, 995 F.2d 611 (5th Cir. 1993) at 617. However, it is submitted that the Court of Appeals was in error in holding that in September, 1986, when Beeson borrowed additional monies from First South to buy out the Lincoln shares from two of the other investors, he suffered a legal injury that commenced the running of the two year statute of limitations. The Court of Appeals cites no authority for its holding on this point. ***Randolph***, 995 F.2d 611 at 618.

It is unclear from the Opinion of the Court of Appeals whether it considers Beeson's purchase of the stock of two of the other investors, his borrowing money to purchase such stock, or both, to constitute a legal injury

commencing the running of the statute of limitations. The Court of Appeals does take note of Beeson's position that had it not been for the Law Firm's malpractice this stock buy out might have been advantageous to him. However the Court of Appeals states "...but Beeson went further into debt and purchased stock in an attempt to rectify a problem allegedly caused by the firm's malpractice." ***Randolph***, 995 F.2 618. The Court of Appeals is looking at this transaction with hindsight. What if this purchase by Beeson of the two other investors' shares in Lincoln had satisfied the Federal Home Loan Bank Board and Beeson and the other investors had retained control of Lincoln?

There is simply no summary judgment evidence in the record that at the time Beeson purchased these shares of stock he suffered any legal injury. There is no summary judgment evidence in the record establishing that Beeson paid more than the then market value for the shares of stock. Even if it was apparent at the time Beeson purchased

the stock of two of the other investors that he would in the future sustain damages as a result of such purchase the statue of limitations would not begin to run at the time of the purchase. ***Atkins v. Crosland,*** 417 S.W.2d 150 (Tex. 1967). In it's opinion below, the Court of Appeals accepts that this is the holding in ***Atkins***. ***Randolph***, 995 F.2d at 611 at 619. However, the Court seems to consider the additional loan for the purchase of the stock a legal injury.

What if Beeson, however misguidedly, decided to purchase other investors stock in September, 1986, completely apart from any consideration of the acting in concert problem. Would the statute of limitations against him on his malpractice claims then begin to have run? It is submitted that it would not.

The Movant in a Motion For Summary Judgment proceeding bears the burden to establish that there is no genuine issue of material fact on any issue on which ***it*** bears the burden of proof. **Federal Rules of Civil**

Procedure, Rule 56; ***Celotex Corp. v. Catrett,*** 477 U.S. 317, at 323-327; ***Howell Hydrocarbons, Inc. v. Adams,*** 879 F.2d 183, 191 (5th Cir. 1990). A Statute of Limitations is an affirmative defense which must be pled by the party asserting it and on which such party has the burden of proof. ***Woods v. William M. Mercer, Inc.***, 769 S.W.2d 515, 517 (Tex. 1988); ***Metal Structures Corp. v. Plaines Textiles, Inc.***, 473 S.W.2d 93 (Tex.Civ.App.-Amarillo 1971, no writ) FRCP, Rule 8 (c),Tex.R.C. Proc. Rule 94. The Law Firm had the burden on their Motion For Summary Judgment to establish that there was no genuine issue of material fact as to the running of the applicable statute of limitations.

The Court of Appeals, in vacating the Summary Judgment against the Five Investors on their malpractice claims and remanding to the District Court for further proceeding to determine if such Five Investors suffered any legal injury prior to the critical date for limitations

purposes, states "In making this determination, the District Court should carefully consider the holding in ***Atkins***." ***Randolph***, 995 F.2d 611 at 619. Petitioners certainly concur with this statement by the Court of Appeals.

Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967) was an action by the Plaintiff Atkins against Defendant Crosland, an accountant. The Texas Supreme Court stated in the Opinion that the "...question for decision is: Did the trial court error in granting Defendant's motion for summary judgment based on the ground that Plaintiff's cause of action was filed more than two years after December 31, 1960." p.151. Beginning with the tax year 1958 the Defendant prepared Plaintiff's income tax returns relying on the cash receipts and disbursements method of accounting rather than the accrual method for the tax years 1958 and 1959. In 1960, the Defendant utilized the accrual method of accounting but failed to secure the consent of the Commissioner of Internal Revenue with the result that the

Commissioner required the Plaintiff to retain the cash method for 1960 thereby depriving him of a tax savings of $12,297.32. On October 20, 1961, less than two years prior to the institution of the suit, the Commissioner assessed the Plaintiff with a tax deficiency in this amount. The acts of negligence relied upon by the Plaintiff were in the Defendant's originally adopting the cash method (1958); in failing to obtain the Commissioner's permission to change from the cash method to the accrual method (1960); and in failing to warn Plaintiff to pay off his accounts payable prior to the end of the 1960 tax year (1960). Plaintiff brought suit against Defendant on September 30, 1963, more than two years *after* each of these acts relied on by Plaintiff. In holding that none of these three acts were a "legal injury" which would commence the running of limitations, the Court states:

> "We must first determine when the plaintiff's cause of action accrued, for it is at that time that the two year statute of limitations began

to run. Article 5526, Vernon's Annotated Civil Statutes. The plaintiff argues that the statute did not begin to run until the tax deficiency was assessed by the Internal Revenue Service, i.e., only at that time was the tort complained of completed. We agree with this contention.

***

"A legal injury must be sustained, of course, before a cause of action arises. It is said in 34 Am. Jur. Limitations of Actions § 160, p. 126:

> 'As regards the running of the statute of limitations applicable to torts, a cause of action accrues only when the force wrongfully put in motion produces the injury, the invasion of personal or property rights accruing at that time.' (citing the Quinn Case, supra.)

"And see *Houston-American Finance Corp. v. Travis*, 343 S.W.2d 323 (Tex.Civ.App. 1960, writ Ref'd n.r.e.). A helpful and often quoted test for determining when the cause of action accrues is found in 54 C.J.S. Limitations of Actions § 168, p. 122-123:

> "The test to determine when the statute of limitations

> begins to run against an action sounding in tort is whether the act causing the damage does or does not of itself constitute a legal injury, that is, an injury giving rise to a cause of action because it is an invasion of some right of plaintiff. If the act is of itself not unlawful in this sense, and plaintiff sues to recover damages subsequently accruing from, and consequent on, the act, the cause of action accrues, and the statute begins to run, when and only when, the damages are sustained; and this is true although at the time the act is done it is apparent that injury will inevitably result.'" (emphasis supplied) p. 152-153.

Beeson's position is that he first suffered damage from the Law Firm's malpractice when the Federal Home Loan Bank Board required him, and the other investors, to withdraw from any active participation in Lincoln which was subsequent to February 8, 1987.

II.

Certiorari should be granted because the Court of Appeals declined to decide the question of negotiability of Petitioners' Promissory Notes because the Petitioners' State court lawsuit was not a "record of the bank" when the FDIC took over First South based upon *Langley v. FDIC*, 484 U.S. 86 (1987). *Langley* did not decide this and it is an important question of Federal law which should be decided by this Court.

1. **The Petitioners' Promissory Notes to First South are non-negotiable and thus the RTC is not a holder in due course.**

Petitioners' Notes payable to First South provides for a variable rate of interest as follows:

a. The Beeson, September 30, 1986, $2,576,000.00 Note provides:

"and to pay interest thereon from date until maturity at a per annum rate (determined on a daily basis, the first such determination being made on the date the holder of this Note advances any portion of the principal of this Note, and subsequent determinations being made on the date upon which a change in such rate occurs) equal to the lesser of (i) or (ii) as follows:

"(i) The sum of two percent (2.00%) per annum plus the "Prime Interest Rate", as such term is hereinafter defined (the "Applicable Rate"); or

"(ii) The maximum lawful rate of interest permitted to be charged by the holder of this Note to Maker under the laws of the State of Texas or the United States of America (whichever is higher) and further limited by the provisions of this Note hereinafter set forth, which provisions control the calculation of interest to be charged on the loan evidenced by this Note (the "Maximum Rate");

* * *

"The term "Prime Interest Rate," as used herein, means the rate of interest announced by ALLIED BANK OF TEXAS, Houston, Texas, or its successors, as its prime rate, regardless of whether such rate of interest is based upon any particular type of loans or borrowers or any one or more other factors or reasons and whether or not any notice is given or announced concerning

such rate of interest or any change thereof, and whether such rate is denominated as its prime rate, its base rate or some similar designation; further provided, that in the event that any such rate shall no longer be available from Allied Bank of Texas for whatever reason, the holder hereof may use the Prime Interest Rate, as defined above, of any other banking institution in Harris County, Texas." (Emphasis supplied) (Record, Beeson Note, p. 771)

The Beeson, September 30, 1986, $689,295.50 Note contains the same wording as the Beeson $2,576,000.00 Note.

b. The Foster, January 5, 1985, $171,113.20 Note provides:

"All capitalized terms which are used but not defined in this Note shall have the same meaning as in the Loan Agreement dated as of even date herewith between the Borrower and FSSA (such Loan Agreement together with all amendments or supplements thereto, being the "Loan Agreement"). (emphasis supplied)

"In addition to the principal sum referred to in the first paragraph of this Note, the Borrower also agrees to pay interest on all amounts hereof so advanced and remaining from time to time unpaid hereon from the date hereof until maturity at a varying rate per annum which is

> two percent (2%) (the "Margin Percentage") plus the Prime Rate, but in no event to exceed the Highest Lawful Rate. Past due principal and interest shall bear interest at the Highest Lawful Rate, provided however, if no Highest Lawful Rate is applicable then at a varying rate per annum which is six percent (6%) above the Prime Rate. Adjustments in the varying interest rate shall be made on the same day as each change announced in the Prime Rate and, to the extent allowed by law, on the effective date of any change in the Highest Lawful Rate."

On April 10, 1991, in ***Ackerman v. Federal Deposit Insurance Corp.*** 930 F.2d 3 (5th Cir. 1991) the Court of Appeals certified to the Supreme Court of Texas the question of whether or not a particular variable rate interest note was non-negotiable because of the variable rate interest provided in such note. In ***Ackerman***, (which in the subsequent opinion of the Texas Supreme Court becomes ***Amberboy v. Societe de Banque Privee et al***) the appellants contended that the appellee was not a holder in due course of the notes because the interest rate could be calculated only by reference to a source outside the note itself, such

source being in ***Ackerman*** the lender's (payee's) published prime rate of interest.

The questions certified to the Texas Supreme Court by ***Ackerman*** was "Is a promissory note requiring interest to be charged at a rate that can be determined only by reference to a bank's published prime rate a negotiable instrument as defined by the Texas Uniform Commercial Code?" (Emphasis supplied)

In answering this certified question the Texas Supreme Court in ***Amberboy v. Societe de Banque Privee et al***, 831 S.W.2d 793 (Tex. 1992) held that the lending institution's prime rate of interest, used as a basis for a variable rate of interest in the note, did not render the note non-negotiable. Keeping in mind the facts stated in ***Ackerman*** as certified to the Texas Supreme Court, i.e., that the variable rate of interest there was based on the lender's prime rate, the Texas Supreme Court held that such facts did not render the note in ***Ackerman*** non-negotiable. In a five to four decision

the Texas Supreme Court, with four Justices rather vehemently expressing their opinion that even this limited variable rate of interest note was non-negotiable, made the following statements:

> "It is our task to construe the U.C.C.'s 'four corners' rule for determining whether the sum certain requirement is met. For an instrument to be negotiable under that rule, the sum certain to be paid must be capable of computation 'from the instrument itself without reference to any outside source...." Tex. Bus. & Com. Code Ann. Sec. 3.106, comment 1 (Vernon 1968). (Emphasis supplied) p. 794

* * * * *

> "A VRN which contains provision for interest to be paid at a variable rate that is readily ascertainable by reference to a bank's published prime rate is compatible with the Code's objective of commercial certainty. The Code does not require 'mathematical certainty' but only commercial certainty." ***
> "Commercial certainty serves the purpose of the law of negotiable instruments, which is to make the instrument the functional equivalent of money." ***
> "If the rate of interest to be paid under the instrument is readily ascertainable by reference to a bank's published prime rate, this purpose is achieved." (Emphasis supplied) p. 796

* * * * *

"Therefore, in response to the question certified to us by the United States Court of Appeals for the Fifth Circuit we reply that a promissory note requiring interest to be charged at a rate than can be determined only by reference to a bank's published prime rate is a negotiable instrument as defined by the Texas Uniform Commercial Code. By a 'bank's published prime rate,' we intend our answer to include only those rates which are public, either known to or readily ascertainable by any interested person. See Black's Law Dictionary 1233 (6th ed. 1990) We do not however, specify or limit the manner in which the rate must be published. The requirement of commercial certainty is satisfied when the information is readily available to the public, regardless of the means utilized to make that information available." (Emphasis supplied) p. 797-798

From the above quotations from the five member majority of the Texas Supreme Court, and considering the facts of the ***Amberboy*** case, i.e. that the note therein had a variable rate of interest determined by the lender's own prime rate of interest, it would seem evident that the majority in ***Amberboy*** merely held that:

1. The note is not rendered non-negotiable by the fact that it contains a variable rate of interest determined by the lender's own prime rate of interest,and

2. That the prime rate of interest determining the variable rate of interest of the note must be "published" at least to the extent that any person "interested" in the note would be able to determine not only the interest accrued on the note but interest that would accrue in the future should such "interested person" become, or attempt to become, a holder in due course of the note.

Referring back to the variable rates of interest set out, supra, in the Petitioners' Notes to First South they are in no way negotiable under the restricted criteria established by the majority opinion in ***Amberboy***.

The variable rate interest in the two Beeson notes provide, basically, as follows:

A. Determined on a daily basis it is to be the lesser of the maximum rate allowed to be charged by the holder under the laws of the State of Texas or of the United States (whichever is higher) or

B. The following:

1) The interest rate is based on the prime rate plus two percent of Allied Bank of Houston or its successors;

2) whether or not Allied Bank of Houston gives any notice or announcement of its prime rate or any change thereof; and

3) in the event that the prime rate of Allied is no longer available for whatever reason the holder of the note may use, in determining the interest rate, the prime interest rate of any other banking institution in Harris County, Texas.

With regard to the Beeson Notes, considered in light of the holding of the majority in ***Amberboy***, first, it can be determined on a daily basis being the lesser of the maximum rate allowed to be charged by the State or the United States, (whichever is higher) or, second a prime rate plus (1) not based on the lender's own prime rate but based on the prime rate of another lending institution (Allied) or

its successors; (2) the Allied prime rate is the basis for the variable rate of interest in the Beeson Notes even though the notes state that the Allied prime rate controls whether or not Allied gives any notice or announcement of its prime rate or any change thereof; (even though the majority in ***Amberboy*** would not commit themselves to specifically defining what a bank's published "prime rate" was, ***Amberboy*** was concerned only with the lender's prime rate and did state "... we intend our answers to include only those rates which are public, either known to or readily ascertainable by any interested person;") and (3) the Beeson Notes provide that in determining the variable rate of interest, if the prime rate of Allied is no longer available "for whatever reason", the holder of the note may use, in determining the interest rate on the note, the prime rate of any other banking institution in Harris County, Texas. This is hardly the "sum certain" required to make an instrument negotiable.

The Foster Note purports to establish an interest rate of two percent above the prime rate. However, this Note does not even refer to what the prime rate is other than stating that "Prime Rate" (which is a capitalized term) is a "capitalized term" used, but not defined, in the Note which shall have the same meanings as the Loan Agreement dated as of the even date herewith between the borrower and FSSA (First South). How could the "interested person" referred to in ***Amberboy*** in any way determine the rate of interest the Foster Note bears when reference must be made to a separate and distinct agreement between the borrower and the lender?

The Plaintiffs again respectfully call the Court's attention to the narrowly limited facts of the ***Amberboy*** case (a variable interest rate note based on the prime rate of the lender) and the above quotations of the five member majority opinion of the Texas Supreme Court in answering this Court's certified question. This majority points out in

Amberboy that Tex. Bus. & Com. Code Ann. Sec. 3.106 in requiring that an instrument be for a "sum certain" to be negotiable it must provide an interest rate "*** that is readily ascertainable by reference to a bank's published prime rate is compatible with the Code's objective of commercial certainty. The Code does not require 'mathematical certainty' but only commercial certainty." p. 796. Plaintiffs submit that on examination of the variable rate interest terms of any of the three Notes in question here there is not only a complete absence of commercial certainty, but no expectation by any reasonable person who might become a purchaser or assignee of the Note, to become a holder in due course. The variable rates of interest in Plaintiffs' three Notes are not variable rates. They are simply an amount of money to be charged by First South over and above the principal which amounts which cannot be determined not only by an "interested person" but by no person other than whatever person at First South

made the interest choice or, in the case of the Foster Note, was privy to the rate established by the Loan Agreement. Given this, how could one think that he or she was purchasing an obligation for a sum certain?

In ***Amberboy***, the note there considered was negotiable, so long as it is limited to what it was, in fact, limited to: 1) the variable rate of interest provided for in the note is based upon the prime rate of the lender (payee) of the note and 2) such prime rate is published. Petitioners' recognize that the Texas Supreme Court refused, because it was not required to, define what it meant by "published" prime rate. However, the Court did, Petitioners suggest, make the requirement that "published" means that any "interested person" should be able to establish not only the interest which had accrued on the note but that which might accrue in the future. It seems obvious that by "interested person" the Texas Supreme Court must have in mind a purchaser or other assignee of a variable rate interest note

who, in purchasing or otherwise becoming an assignee, would expect to be a holder in due course.

2. **Because Petitioners' Promissory Notes are non-negotiable the personal defenses asserted by them are available against the RTC**

In ***Sunbelt Savings, FSB Dallas, Texas v. Montross***, 923 F.2d 353 (5th Cir. 1991, reh'g granted), a panel of the Court of Appeals stated:

> "We do not view negotiability as a technical requirement. Negotiability is the foundation underlying all of Article Three and of holder in due course status in particular. . . . When the negotiable note is in the hands of a holder in due course, the maker is left with few defenses, thus, the instrument's value is enhanced. Non-negotiable instruments, however, are contractual obligations, which do not enjoy holder in due course protections. The makers of variable interest rate notes sign only a contractual obligation to repay their debt; they had no expectation that holder in due course doctrine would strip them of their defenses.
>
> "Extending holder in due course status to the FDIC and its successors respecting non-negotiable instruments is both unnecessary and undesirable. When the FDIC assumes control of an institution, the assets are what they are–negotiable instruments, contracts, real property,

> and so on. We agree that the FDIC should not be disadvantaged by the circumstances of its assumption of control, but this policy does not require giving the FDIC the ability to transmute lead into gold. Allowing the FDIC to transform contracts into negotiable instruments would defeat the reasonable commercial expectations of the variable interest note makers."
> p. 356-357.

In ***Sunbelt***, supra, the court held "after carefully reviewing our decisions and the policy underlying them, we decline to extend the federal holder in due course status to the FDIC or its successor in cases in which it acquires non-negotiable instruments through purchase and assumption transactions." p.356

The court in ***Sunbelt*** held that the note in question was non-negotiable because it provided for a variable rate of interest.

On May 15, 1991, the 5th Circuit in ***Sunbelt*** ordered a rehearing en banc. 932 F.2d 363 (5th Cir. 1991).

On October 9, 1991, the 5th Circuit en banc on the rehearing in ***Resolution Trust Corporation v. Montross***, 944

F.2d 227 (5th Cir. 1991) reinstated the panel opinion (923 F.2d 353) in part. In it's opinion the full Court, excepting one judge who resigned and five judges who were reclused and did not participate in the decision, stated:

> ". . . The panel opinion at 923 F.2d 353 is reinstated, except that we take no position on the effect of the variable interest rate on the negotiability of the note. The maker of the note gave other reasons for the note being non-negotiable, and the case was presented on the appeal with both parties accepting the non-negotiability of the note. Sunbelt's contention to the contrary before the en banc court comes too late. See ***Najarro v. First Federal Savings & Loan Ass'n of Nacogdoches, Texas***, 918 F.2d 513, 516 (5th Cir.1990);***Moore v. United States***, 598 F.2d 439, 441 (5th Cir. 1979).
>
> " [2] The personal defenses to which the maker is entitled must, of course, be based on documents of the savings institution at the time of its insolvency and not upon secret agreements unenforceable under ***D'Oench, Duhme & Co. v. FDIC***, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). See ***Howell v. Continental Credit Corp.***, 655 F.2d 743 (7th Cir.1981)." (Emphasis supplied)

Petitioners' personal defenses, to which they are entitled because of the non-negotiability of their Notes, are

based on documents of First South at the time of its insolvency and not upon secret agreements unenforceable under ***D'Oench,Duhme***. On February 8, 1989, all Petitioners and four of the other Five Investors filed suit in the District Court of Harris County against First South seeking cancellation of their Notes and damages. This lawsuit was served on First South on February 21, 1989. On March 16, 1989, the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation as conservator for First South. First South's Answer to the Harris County District Court lawsuit was filed prior to March 16, 1989. Thus, that lawsuit was a "document of the savings institution at the time of its insolvency . . ." See ***Montross***, en banc, supra.

In the recent case of ***Texas Refrigeration Supply v. FDIC*, 953 F.2d 975 (5th Cir. 1992, reh'r den April 2, 1992)**, this Court stated:

"[7] ***D'Oench, Duhme*** does not of itself thwart

> the assertion of rights for relief from wrongful acceleration and unreasonable sale at foreclosure. See *Garrett v. Commonwealth Mortgage Corporation of America*, 938 F.2d 591, 595 (5 Cir.1991) ('[N]either section 1823(e) nor the *D'Oench, Duhme* doctrine prevents plaintiffs from asserting claims or defenses that *do not depend on agreements*." (emphasis supplied)). We repeat, *D'Oench, Duhme* only protects the FDIC and federally created bridge banks from oral agreements that for some reason do not become part of the loan record (usually, oral agreements). p. 981

Unlike the situation in ***Langley v. FDIC***, 484 U.S. 86 (1987), cited by the Court of Appeals, the fraud committed by First South against the Petitioners, which Petitioners are asserting as a personal defense, is not a condition on repayment of the Notes, and thus an agreement within the purview of 12 U.S.C. 1823(e). First South's fraud consisted of a fraudulent concealment of facts known to First South. If Beeson and the other investors had known of these facts, they never would have consummated their purchase of the Lincoln stock. Petitioners do not claim an "agreement" by which they are excused from liability on the Notes. Also

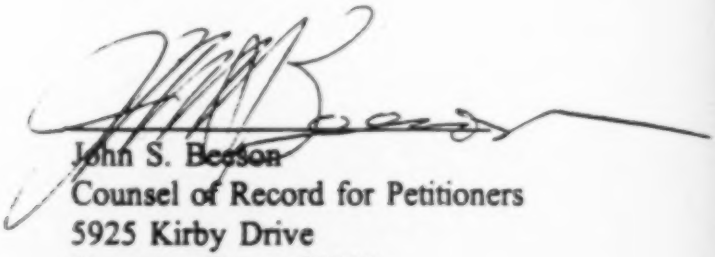
unlike the situation in ***Langley***, the Beeson and Foster Notes are non-negotiable and their lawsuit was a "record of the bank" when the FSLIC took over First South.

The District Court cites ***Kilpatrick v. Riddle***, 907 F2d 1523 (5th Cir. 1990), in support of it's Judgment, stating that the ***D'Oench, Duhme*** doctrine protects the FDIC from the effect of unrecorded agreements even if the FDIC as receiver had knowledge of the agreements. ***Kilpatrick*** involved a claim of fraud (not unrecorded agreements) by the failed bank and a claim that the FDIC had knowledge of the fraud claim when it took over the bank. However, there was no question raised in ***Kilpatrick*** as to the negotiability of the notes there involved and thus, the status or not of the FDIC as a holder in due course. Furthermore, in ***Kilpatrick*** there was nothing in the Bank's records to alert the FDIC as to the claimed fraud.

CONCLUSION

Wherefore, Petitioners respectfully pray that a Writ Of Certiorari be granted.

Respectfully submitted,



John S. Beeson
Counsel of Record for Petitioners
5925 Kirby Drive
Houston, Texas 77005
(713) 942-9912

Miller B. Walker, Jr.
Counsel for Petitioners
P. O. Box 770753
Houston, Texas 77215-0753
(713) 774-9474